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No. 96-1661

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCOR CAPITAL CORPORATION, ET AL., PETITIONERS

v.

WILBUR GOOLKASIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *Bivens* claims brought against the individual federal officers in this case are barred by the statute of limitations.

2. Whether the claim that the United States made an unauthorized disclosure of tax return information in violation of 26 U.S.C. 6103 is barred by the statute of limitations.

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OPINIONS BELOW

The order issued by the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 106 F.3d 406 (Table). The opinions of the district court (Pet. App. 3-13, 14-35) are unreported.

JURISDICTION

The order of the court of appeals was entered on January 15, 1997. The petition for a writ of certiorari was filed on April 15, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth at Pet. App. 36-118.

STATEMENT

1. a. On October 12, 1994, petitioners Amcor Capital Corporation, Fred H. Behrens, and Robert A. Wright filed a complaint based on *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), seeking an award of damages against twenty present and former federal employees for alleged violations of constitutional rights (Pet. App. 14-15).[1] On January 3, 1995, petitioners filed an amended complaint that added as defendants the United States and a twenty-first federal employee. The amended complaint also added additional causes of action for conspiracy, invasion of privacy and unlawful disclosure of tax return information (*id.* at 15).

The amended complaint alleged that Amcor was formed to raise venture capital for the agricultural industry and that the defendants had conspired to destroy Amcor in order to maximize tax assessments, interest and penalties (CR 3 at 2).[2] The conspiracy allegedly included baseless criminal investigations and civil tax audits, the wrongful disclosure of confidential tax return information, illegal telephone

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[1] In the complaint, Behrens and Wright brought suit both in their individual capacities and as general partners "for certain listed AMCOR limited partnerships" (CR 3 at 1). The complaint contains a list of the names of the limited partnerships (CR 3, Exh. A) but does not identify the partners.

[2] "CR" refers to the docket control numbers assigned to the documents in the original record by the clerk of the district court.

wiretaps and videotapes, grand jury secrecy violations, invasion of Amcor's attorney-client privileges, misrepresentations to representatives of Congress and to the Tax Court, and a scheme to cover up the alleged violations (*id.* at 3-4).

The United States and the twenty-one federal employees filed separate motions to dismiss or for summary judgment (Pet. App. 4, 16). Among the several defenses asserted, the defendants urged that all of the asserted claims for relief were barred by the applicable statutes of limitations (*ibid.*).[3] In support of that contention, the defendants submitted internal memoranda and letters written by Amcor showing that Amcor had knowledge of the actions recited in the complaint more than two years prior to commencement of suit (*id.* at 8, 12, 26-27, 31).

In opposing this motion, Amcor submitted declarations that purported to establish that Amcor did not know of the facts on which the complaint was based prior to 1994, the year in which the complaint was filed (CR 40). Amcor also argued that the statute of limitations was tolled by (i) ongoing settlement discussions with the government; (ii) the government's refusal to produce documents and evidence to Amcor; (iii) the government's fraudulent concealment of facts; (iv) Amcor's attempts to exhaust administrative remedies; and (v) continuing unlawful actions of the defendants (Pet. App. 26 n.1). Amcor sought to conduct discovery to obtain evidence in support of its theories.

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[3] Amcor agreed with the United States that the first three claims for relief should be dismissed as to the government because the United States cannot be sued on a *Bivens* claim (Pet. App. 7).

The parties agreed that the two-year statute of limitations in 26 U.S.C. 7431(d) governs the timeliness of petitioners' claim that the government unlawfully disclosed confidential tax return information (Pet. App. 7). The parties disagreed, however, about what statute of limitations governs the *Bivens* claims against the individual federal employees. Amcor urged (*id.* at 22) that its *Bivens* claims were subject to the four-year "catch-all" statute of limitations in Cal. Civ. Proc. Code § 343 (West 1982). The federal employees contended instead that the *Bivens* claims were subject to the one-year personal injury statute of limitations codified in Cal. Civ. Proc. Code § 340(3) (West 1982).

b. The district court agreed with the federal employees that the *Bivens* claims are governed by the California one-year statute of limitations for personal injuries (Pet. App. 22-25). The court explained that this conclusion follows directly from this Court's holding in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), that the state statute of limitations for personal injury actions governs the timeliness of claims against state officers for violations of constitutional rights under 42 U.S.C. 1983. The district court noted that the Second, Sixth, Seventh, and Ninth Circuits have all held that the state personal injury statute of limitations governs both Section 1983 claims and *Bivens* claims (Pet. App. 23-25).

The court further held that "Amcor's own letters and internal memorandum" demonstrate that "Amcor and its principals knew of their alleged claims against the majority of these defendants as early as December 1991 or at the latest by March 16, 1993," and that the action, commenced on October 12, 1994, was therefore time-barred (Pet. App. 26). The court

quoted extensively from the 25-page letter of December 19, 1991, from Behrens's attorney, Roger M. Olsen, which alleged a "pervasive, and willful circumvention and disregard of legal principles and Federal statutes by both the Justice Department and the IRS" (*id.* at 27). The court also noted that Amcor's June 17, 1992, internal memorandum complained of a "*pattern* of blatant Government misconduct" and described Amcor's desire to expose and seek redress for that alleged wrongdoing (*id.* at 31). The court also cited the March 16, 1993, letter from Barry Governman, Amcor's vice-president, to the Honorable Larry A. Compest of the United States House of Representatives, which states that "the events * * * became known to us based, largely, on *sworn testimony* obtained through civil litigation in the U.S. District Court between 1990 and 1993" (*ibid.*; see also *id.* at 8) and that "fiduciary responsibility to our limited partners mandates that a lawsuit be filed against the U.S. Government" (*id.* at 32).

Based on these Amcor documents, the court concluded that, although "Amcor may not have been aware of the identities of all of the Individual Defendants as of June 1992," it "was aware of the aforementioned allegations and the alleged conspiracy by the Government's agents and, or employees by December 1991 or at the latest by June 17, 1992" (Pet. App. 34).[4] The court therefore held the action against the federal employees to be untimely (*ibid.*):

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[4] The court concluded that Amcor was "aware of all of the core facts which support its claims" more than one year prior to commencement of suit and therefore rejected the various tolling arguments that petitioners advanced (Pet. App. 26 n.1).

> If Amcor had not sat on its claims and filed its complaint in a timely fashion, Amcor would have preserved its claims, could have sought discovery to determine the identities of * * * all of the Individual Defendants and sought leave to amend to name any of the Individual Defendants whose identities Amcor was not previously aware. By waiting, Amcor took a calculated risk that its claims against these defendants would be time-barred.

c. The district court similarly determined that Amcor's suit against the United States for unauthorized disclosures of federal tax return information—which was brought on January 3, 1995—is barred by the two-year statute of limitations in 26 U.S.C. 7431(d). The court explained that "Amcor's own letters and internal memoranda indicate that Amcor knew of the core facts which make up its allegations against the Government before January 3, 1993" (Pet. App. 13). The court noted that the Olsen letter of December 19, 1991, complained of the government's alleged violation of taxpayer privacy rules "by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about [the] same" (*id.* at 9). The court also pointed out that Amcor's June 17, 1992, memorandum complained of "the impropriety of the thirty-day letters, the fraud contained in those letters * * *, the Government's involvement with the Department of Agriculture and the Government cover-up of the misconduct" (*id.* at 12).

4. In a one-sentence order, the court of appeals affirmed "substantially for the reasons stated" by the district court (Pet. App. 2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The courts below correctly concluded that the one-year state statute of limitations for personal injury claims (Cal. Civ. Proc. Code § 340(3) (West 1982)) governs the timeliness of *Bivens* claims. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), this Court held that suits under 42 U.S.C. 1983 are "best characterized as personal injury actions" and that the state statute of limitations on such actions therefore governs such suits. 471 U.S. at 280. The courts of appeals have consistently concluded that the reasons for applying the state statute of limitations on personal injury actions to suits under 42 U.S.C. 1983 apply with equal force to *Bivens* suits and that the personal injury statute of limitations, rather than the "catch-all" statute of limitations, therefore governs *Bivens* suits. See, *e.g.*, *Chin* v. *Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *Kurinsky* v. *United States*, 33 F.3d 594, 599 (6th Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995); *Bieneman* v. *City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989); *Sanchez* v. *United States*, 49 F.3d 1329, 1330 (8th Cir. 1995); *Van Strum* v. *Lawn*, 940 F.2d 406, 408-410 (9th Cir. 1991);[5] *Industrial Constructors Corp.* v.

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[5] In *Gerritsen* v. *Consulado General de Mexico*, 989 F.2d 340, 343, cert. denied, 510 U.S. 828 (1993), the Ninth Circuit—apparently unaware of its then-recent decision in *Van Strum*—

United States Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994); *Kelly* v. *Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996).

b. Although the statute of limitations for *Bivens* claims is determined by incorporating analogous state law, federal law determines when the claim accrues and when the limitations period begins to run. *Fobbs* v. *Holy Cross Health Systems Corp.*, 29 F.3d 1439, 1444 (9th Cir. 1994), cert. denied, 115 S.Ct. 936 (1995); *Gibson* v. *United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *Bagley* v. *CMC Real Estate Corp.*, 923 F.2d 758, 761-762 (9th Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *Norco Construction, Inc.* v. *King County*, 801 F.2d 1143, 1145 (9th Cir. 1986); *Blanck* v. *McKeen*, 707 F.2d 817, 819-820 (4th Cir. 1983), cert. denied, 464 U.S. 916 (1983).

The district court correctly determined that contemporaneous documents authored by Amcor and its agents established that petitioners were aware of the facts giving rise to this action more than one year

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applied the California four-year catch-all statute of limitations in holding that a *Bivens* action was time-barred. The facts of that case evidently did not require the court to determine whether the one-year statute of limitations applied instead. With the exception of *Gerritsen*, which appears to be an anomaly and contains "no analysis" (Pet. App. 22), the Ninth Circuit has uniformly applied the one-year statute of limitations to *Bivens* suits in cases that arose after this Court's decision in *Wilson* v. *Garcia*, *supra*. See *Van Strum* v. *Lawn*, *supra*; *Matthews* v. *Macanas*, 990 F.2d 467, 468-469 (9th Cir. 1993); *Kreines* v. *United States*, 959 F.2d 834, 836 (9th Cir. 1992). See also pages 11-12, *infra*.

before the suit was commenced.[6] That factual determination, concurred in by both courts below, does not warrant this Court's review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

c. In moving for summary judgment on the statute of limitations issue, the federal employees satisfied

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[6] For example, Amcor alleged that defendant Laurence, in violation of Department of Justice guidelines and statutory requirements, issued non-prosecution letters to certain Texas farmers who grew crops for Amcor partnerships (CR 3 at 6-7, 16-17). The Olsen letter of December 19, 1991, demonstrates Amcor's longstanding knowledge of these alleged violations, for it states that "[t]he immunity having been secured in direct violation of §§ 6103 and 7602(c) of the Code, the agents and Laurence thereby committed a felony" (Pet. App. 30).

Amcor also alleged that defendant Goolkasian violated Amcor's right to counsel and its attorney-client privilege (i) by using as a paid informant Wendell Davies, who was counsel for an immunized witness, and (ii) by monitoring conversations between Davies and his clients (CR 3 at 5-6, 16, 18-19). Mr. Olsen's letter of December 19, 1991, reflects his early knowledge of these allegations, for it objects to (Pet. App. 27-28):

> The violation of the Fifth and Sixth Amendments by the corruption of the attorney-client privilege and relationship by retaining as an undercover paid informant the services of the lawyer for an immunized witness.
>
> * * * The violation of the Fifth and Sixth Amendments by the illegal use of an attorney who, operating as a paid informant, attempted to and successfully did violate the attorney-client privilege of Behrens and others.

The Olsen letter identified Goolkasian as the perpetrator of the alleged violations (*id.* at 28-30). The Olsen letter also demonstrates that Amcor was aware of allegedly illegally-monitored conversations, an allegedly overly-broad search warrant and allegedly punitive partnership tax determinations (CR 33, Exh. 2 at 5, 9, 21).

their burden of demonstrating the absence of a genuine issue of material fact by producing the internal documents of Amcor that revealed petitioners' long-standing awareness of the actions for which they belatedly brought suit. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In response, Amcor failed to come forward with specific facts showing the existence of a genuine issue of material fact. On this record, the district court properly entered summary judgment in favor of the federal employees. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986).

Petitioners err in contending (Pet. 11-12) that there is a conflict among the circuits as to whether summary judgment may be granted on a statute of limitations issue. The cases on which petitioners rely hold only that summary judgment may not be granted when there is a triable issue of fact. See *Maughan* v. *SW Servicing, Inc.*, 758 F.2d 1381, 1388 (10th Cir. 1985) ("We are not convinced that the record, viewed in the light most favorable to the plaintiffs, demonstrates conclusively that plaintiffs knew or should have known of the causal connection between leukemia and the uranium mill tailings in Monticello before August 28, 1978."); *Williams* v. *Borden Inc.*, 637 F.2d 731, 738 (10th Cir. 1980) ("Considering the whole record and the differing inferences reasonably possible * * * , we cannot agree that the record supports a summary judgment dismissing plaintiff's case on limitations grounds."); *Lundy* v. *Union Carbide Corp.*, 695 F.2d 394, 397 (9th Cir. 1982).[7] In this case, as the courts below cor-

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[7] *Aldrich* v. *McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980), on which Amcor also relies (Pet. 12), did not

rectly concluded, there is no triable issue of material fact.

Petitioners err in contending (Pet. App. 12) that they had an absolute right to take discovery prior to consideration of the summary judgment motion. Such discovery is discretionary with the trial judge. See Fed. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court * * * may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had."). A trial court's refusal to permit discovery pending a ruling on a motion for summary judgment is reviewable for abuse of discretion. See, *e.g.*, *Qualls* v. *Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994); *Ashton-Tate Corp.* v. *Ross*, 916 F.2d 516, 519 (9th Cir. 1990). It was not an abuse of discretion to require petitioners to address the summary judgment motion before allowing further discovery in this case. The statute of limitations question presented in the motion for summary judgment required a determination of when petitioners became aware of certain past events. That is an issue peculiarly within petitioners' own knowledge. No showing has been made that discovery was needed to inform petitioners of the state of their own past knowledge.

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involve a summary judgment motion, but a dismissal of an amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). In reversing, the appellate court stated that the question whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. The court, however, did not preclude the determination of this issue on summary judgment, where affidavits, depositions and exhibits could be considered.

d. There is no merit to petitioners' further contention (Pet. 14-16) that evidence of a continuing conspiracy establishes the timeliness of their suit. Even if conspiracy rules were relevant to this case, the action is time-barred. Under federal law, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy.'" *Gibson* v. *United States*, 781 F.2d at 1340, quoting *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 (1st Cir. 1977), quoting *Hoffman* v. *Halden*, 268 F.2d 280, 303 (9th Cir. 1959). Accord, *West* v. *Carson*, 49 F.3d 433, 436 (8th Cir. 1995). The statute of limitations therefore "runs separately from each overt act" alleged to have damaged the plaintiffs, and plaintiffs can recover *only* for overt acts specifically alleged to have occurred within the statutory period. *Gibson* v. *United States*, 781 F.2d at 1340. See also *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979). Because the complaint does not allege that any overt act causing damages was committed within the one-year period prior to October 12, 1994, the courts below correctly determined that the suit is barred by the statute of limitations (Pet. App. 26).[8]

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[8] As evidence of its "continuing conspiracy" theory, Amcor seeks to rely (Pet. 15) on (i) the fact that the government opposed certain discovery sought by petitioners in a Tax Court case in the Summer of 1994 and (ii) a letter written by the Internal Revenue Service on October 20, 1993, to various congressmen explaining why petitoners' allegations of governmental misconduct lack any foundation. The "evidence" on which petitioners rely appears to represent, if anything, allegations of "acts of concealment" rather than overt acts causing damage. It is well established in conspiracy law that "acts of concealment," committed after the central object of the

e. Petitioners offer no authority to support their contention (Pet. 16-18) that the statute of limitations should be tolled because of an unresolved intra-circuit conflict in the Ninth Circuit as to the applicable statute of limitations for *Bivens* suits.[9] The intra-circuit conflict that petitioners describe is, in any event, illusory. See note 5, *supra*. For claims that arose after this Court's decision in *Wilson* v. *Garcia*, *supra*, the Ninth Circuit has consistently applied the state statute of limitations for personal injuries in determining the timeliness both of *Bivens* suits and of suits under 42 U.S.C. 1983. See *Van Strum* v. *Lawn*, *supra*; *Matthews* v. *Macanas*, 990 F.2d 467, 468-469 (9th Cir. 1993) (citing *Van Strum*); *Kreines* v. *United States*, 959 F.2d 834, 836 (9th Cir. 1992); *De Anza Properties X, Ltd.* v. *County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991); *McDougal* v. *County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991); *Harding* v. *Galceran*, 889 F.2d 906-907 (9th Cir. 1989); *Donoghue* v. *Orange County*, 848 F.2d 926, 929-930 n.2 (9th Cir. 1987); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987). The cases cited by Amcor in

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conspiracy has been accomplished, and for the purpose of covering it up, are *not* part of the conspiracy for statute of limitations purposes. *Grunewald* v. *United States*, 353 U.S. 391 (1957); *United States* v. *Finlay*, 55 F.3d 1410, 1415 (9th Cir.), cert. denied, 116 S.Ct. 193 (1995); *Forman* v. *United States*, 259 F.2d 128, modified, 261 F.2d 181 (9th Cir. 1958), aff'd, 361 U.S. 416 (1960); *United States* v. *Lash*, 937 F.2d 1077, 1082 (6th Cir.), cert. denied, 502 U.S. 949 (1991); *United States* v. *Fletcher*, 928 F.2d 495 (2d Cir.), cert. denied, 502 U.S. 815 (1991).

[9] As noted above, other circuits have uniformly held that the state statute of limitations for personal injuries applies to *Bivens* suits. See pages 7-8, *supra*.

which the Ninth Circuit applied the four-year "catch-all" statute of limitations either predated *Wilson* v. *Garcia* (see *Marshall* v. *Kleppe*, 637 F.2d 1217 (9th Cir. 1980)) or involved claims that arose prior to the date of the *Wilson* decision (see *Gibson* v. *United States*, 781 F.2d at 1342 & n.5; *Gerritsen* v. *Consulado General de Mexico*, 989 F.2d 340, 343 (9th Cir.), cert. denied, 510 U.S. 828 1993)).

f. Petitioners further err in contending (Pet. 19-23) that the California doctrine of equitable tolling applies to this case. California permits equitable tolling of the limitations period "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one."[10] *Elkins* v. *Derby*, 115 Cal. Rptr. 641, 644 (1974), quoting *Myers* v. *County of Orange*, 86 Cal. Rptr. 198, 203 (Ct. App. 1970). For equitable tolling to apply in California, the claims in the two actions must be "based on essentially the same set of facts" so that "timely investigation of the first claim should put the defendant in position to appropriately defend the second." *Collier* v. *City of Pasadena*, 191 Cal. Rptr. 681, 686 (Ct. App. 1983).

Petitioners claim that Amcor's petition in Tax Court for review of income tax deficiencies issued by the Commissioner of Internal Revenue tolls the limitations period on their *Bivens* claims seeking damages against the individual federal employees for violations of the Constitution (Pet. 24). The Tax Court suit, however, plainly was not the pursuit of an alternative remedy justifying equitable tolling under

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[10] When, as here, a state statute supplies the applicable statute of limitations, state law, not federal law, supplies the applicable tolling standards. See *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).

California law, for it involves altogether different claims and different parties. The Tax Court cases adjudicated only the income tax liability of petitioners to the government. Their *Bivens* suit, on the other hand, involves the alleged commission of constitutional torts (not a tax deficiency) and seeks to impose individual liability on federal employees for injuries to the taxpayer. Notice of the Tax Court litigation gave no notice to the federal employees of the present suit. The pendency of the Tax Court litigation therefore did not toll the statute of limitations under California law. See *Aerojet General Corp.* v. *Superior Court*, 223 Cal. Rptr. 249 (Ct. App. 1986) (workmen's compensation claim and suit for fraudulent concealment are different remedies for different wrongs); *Hinton* v. *Pacific Enterprises*, 5 F.3d 391 (9th Cir. 1993), cert. denied, 511 U.S. 1083 (1994) (workmen's compensation claim based on retaliatory discharge did not equitably toll ERISA claim alleging interference with an employee's right to obtain certain plan benefits by compelling her to sign a termination agreement); *Del Percio* v. *Thornsley*, 877 F.2d 785, 786 n.1 (9th Cir. 1989) (no equitable tolling where defendants in the second claim were entirely unrelated to parties in the first claim).[11] The proper

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[11] There is no merit to petitioners' claim (Pet. 24) that seeking congressional "redress" is an alternative remedy that would toll the statute of limitations under California law. Petitioners cite no statute or case in support of their novel "tolling" theory. It is, moreover, highly doubtful that California would adopt such a theory if it were ever presented in the state courts. California, like other States, requires the timely filing of claims to ensure that fair notice is given to the defendants. See, *e.g.*, *Addison* v. *California*, 146 Cal. Rptr. 224 (1978); *Elkins* v. *Derby*, *supra*. Such notice can occur only in

application of California principles of equitable tolling to the facts of this case is, in any event, not an issue that warrants review by this Court.

g. Finally, petitioners err in contending (Pet. 25-28) that Cal. Gov't Code § 945.3 (West 1995) tolls the statute of limitations on the *Bivens* claims. Under Section 945.3, a person charged with a criminal offense cannot bring "a civil action for money or damages against a peace officer * * * relating to the offense for which the accused is charged * * * while the charges against the accused are pending before a justice, municipal, or superior court." No charges "before a justice, municipal, or superior court" were pending against petitioners during the period that the statute of limitations ran on their *Bivens* claims. (See Pet. 28.) This statutory tolling provision is therefore inapplicable to this case.[12]

2. The courts below correctly held that the two-year statute of limitations in 26 U.S.C. 7431(d) bars petitioners' suit against the United States for unau-

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proceedings to which the defendants are themselves made parties; it cannot occur from communications between the plaintiff and third parties.

[12] This statutory tolling provision is inapplicable to this case for an additional, unrelated reason. The Ninth Circuit correctly held in *Matthews* v. *Macanas*, 990 F.2d at 469 that Section 945.3 does not apply to federal criminal investigators and law enforcement officers, for Cal. Penal Code § 830.8(a) (West 1985) expressly provides that "federal criminal investigators and law enforcement officers are not California peace officers." Petitioners err in seeking to rely (Pet. 27) on *Harding* v. *Galceran*, *supra*. The tolling provisions of Cal. Gov't Code Section 945.3 were applicable in *Harding* because the plaintiff's suit was brought, under 42 U.S.C. 1983, against deputies of the San Dimas Sheriff's substation in Los Angeles—not against federal officers. 889 F.2d at 908.

thorized disclosures of tax return information. The claim that unauthorized disclosures were made is premised by petitioners on allegedly confidential information contained in (i) notices of proposed deficiencies sent by the Internal Revenue Service to Amcor partnerships and (ii) letters from the Internal Revenue Service to the Agricultural Stabilization and Conservation Service (Pet. 29). As the district court concluded, however, Amcor knew of the facts concerning the issuance of the letters to the Amcor partnerships by June 17, 1992—its internal memorandum of that date complains of "the impropriety of the * * * letters, the fraud contained in those letters, [and the] '*pattern* of blatant Government misconduct directed at AMCOR and its investors'" (Pet. App. 12).

Amcor also knew by December 19, 1991, of the allegedly unauthorized disclosure of information to the Department of Agriculture. The Olsen letter of that date, quoted by the district court, objected to the alleged governmental violation of "taxpayer privacy rules under Internal Revenue Code (Code) § 6103 * * * by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about same" (Pet. App. 9).

On this record, the courts below correctly concluded that the statute of limitations expired before petitioners commenced this action. Further review of this factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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